

PEMBINAAN V-JAYA SDN. BHD.

v.

BINAWISMA DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. F-24-40-86]
10 APRIL 1987

CIVIL PROCEDURE: Summary judgment - Application by plaintiff for leave to sign final judgment - Affidavit of plaintiff filed in support of - No affidavit-in-reply of defendant filed before Senior Assistant Registrar - Defence contains mere denial to plaintiff's claim.

CIVIL PROCEDURE: Appeal - Affidavit-in-reply filed at appeal stage - Purpose of filing at appeal stage - Whether any triable issue.

This was an appeal by the defendant against the decision of the Senior Assistant Registrar who allowed the plaintiff's application for leave to sign final judgment under O. 14 RHC 1980. Apart from the defendant's statement of defence there was no affidavit-in-reply filed by the defendant to the plaintiff's affidavit in support of the application under O. 14 RHC 1980 despite an opportunity being given by the Senior Assistant Registrar to do so. However, the defendant filed his affidavit-in-reply at the appeal stage.

Held:

[1] From the pleadings it is very clear that the defendant's affidavit-in-reply was not filed for the sole purpose of objecting to the plaintiff's application but was intended to improve the statement of defence which contained only a bare denial of the sum claimed by the plaintiff. This was not possible following the decision in the case of *UMBC v. Palm and Vegetable Oil*.

[2] As there are no triable issues disclosed in this case, the Court accordingly dismissed the appeal with costs and confirmed the Senior Assistant Registrar's order for summary judgment under O. 14 RHC 1980.

[Defendant's appeal dismissed with costs. Senior Assistant Registrar's order confirmed.]

Case referred to:

UMBC v. Palm and Vegetable Oil [1983] 1 MLJ 206

Legislation referred to:

Rules of the High Court 1980, O. 14

For the defendant/appellant - Shahul Hameed Amirudin; M/s. Sri Ram Zulkifly & Kumar

For the plaintiff/respondent - Wong Hai Wai; M/s. Manjit Singh Sachdev & Co.

JUDGMENT

Siti Norma Yaakob J:

The application before me was an appeal against the decision of the Senior Assistant Registrar allowing the plaintiff leave to sign final judgment under O. 14 against the defendant. Before the Senior Assistant Registrar there were only the statement of claim, the statement of defence and the plaintiff's affidavit in support of the O. 14 application. No affidavit in reply was filed by the defendant despite an opportunity being given by the Senior Assistant

a Registrar to do so, and reading the statement of defence, which is a bare denial of the plaintiff's claim, it is no wonder that the Senior Assistant Registrar granted the plaintiff's application for summary judgment.

Before me the defendant attempted to improve its position by filing the affidavit in reply to the plaintiff's application and since the appeal is in the nature of a rehearing, the plaintiff had not objected to the affidavit being filed at the appeal stage.

b The plaintiff's claim is for RM45,000 being the sum which the defendant had undertaken to pay the plaintiff in the event negotiations for an earthwork and turnkey project that were to be completed on the defendant's housing scheme turn out to be unsuccessful. The undertaking is contained in a letter dated 21 May 1984 which is acknowledged by the directors of both parties.

c Prior to the undertaking, the plaintiff, a contractor, had at the instance of the defendant commenced excavations and filling of earthworks at the defendant's building site. The works only proceeded for 3 months before they were suspended by which time the plaintiff had done work to the value of RM45,492.50. When the plaintiff demanded payment of that sum, the defendant responded by agreeing to negotiate further with the plaintiff for the completion of the earthwork and turnkey project at its housing scheme. As consideration for such negotiations, the defendant undertook to pay RM45,000 to the plaintiff in the event such negotiations were unsuccessful and it was under these circumstances that the letter dated 21 May 1984 came to be written.

d In its statement of defence, the defendant admitted that the plaintiff had commenced excavation and filling earthworks at its housing project but makes no mention as to whether any sums were due to the plaintiff for such works. It also admitted that it had negotiated with the plaintiff for the purpose of awarding the plaintiff a contract to build the houses at the building site and that if negotiations fail, it was prepared to pay the plaintiff a reasonable sum for works done and services rendered. It denied the plaintiff's claim for RM45,000 and makes no mention whatsoever as to the letter of undertaking dated 21 May 1984.

e In its affidavit in reply filed 8 months after the statement of defence, the defendant pleaded that it has no privity of contract with the plaintiff as the works for which payment had been demanded had been awarded to another contractor who in turn sub-contracted such works to the plaintiff. This plea runs contrary to what it had admitted earlier in its statement of defence dated 6 March 1986. If indeed the plaintiff was a sub-contractor, this fact must have been known to the defendant all along and yet, that was not pleaded in the statement of defence. As for the letter of undertaking, the defendant avers that it was wrongfully written as it did not receive the consents of all the Board members or alternatively, it is unenforceable as being unsupported by any consideration.

f The letter of undertaking dated 21 May 1984, written on the defendant's letterhead and addressed to the plaintiff, is acknowledged by the directors of both parties following a meeting they had between them. The defendant cannot now disclaim liability by stating that it was written without the consent of its board of directors. So long as it is written by somebody with authority in the defendant's company, it must be presumed that he had the necessary authority to commit the defendant company to any contractual obligations. It is hardly expected that anybody dealing with a company should question the authority of every person representing such a company, unless of course it is plain and clear that such a person had no authority to make any commitment on behalf of the company. In this case, a person

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of no less standing than a director of the defendant company had signed on the letter of undertaking and since the subject matter was known to both parties, I consider that there is no merit to the defendant's objection that the letter of undertaking was wrongfully written.

As for its enforceability, the consideration must, under the circumstances of this case, be the amount that is due to the plaintiff for the earthworks that it had done on the site as early as 1982, a fact that had been admitted by the defendant in the statement of defence.

Reference was also made by the defendant to another letter executed on the same day as the letter of undertaking to show that there may well be a dispute as to the amount demanded by the plaintiff. This second letter has no relevance to the plaintiff as it was addressed to a Syarikat Pembinaan & Perniagaan Binajaya and it refers to the termination of contract it had with the defendant on payment of a sum of RM10,000 by the defendant as compensation.

From the pleadings it is very clear that the defendant's affidavit in reply was not filed for the sole purpose of objecting to the plaintiff's application but was intended to improve the statement of defence which contained only a bare denial of the sum claimed by the plaintiff. This is not possible following the decision in the case of *UMBC v. Palm and Vegetable Oil* [1983] 1 MLJ 206, and as there are no triable issues disclosed in this case, I had accordingly dismissed the appeal with costs and confirmed the Senior Assistant Registrar's order for summary judgment under O. 14.

Also found at [1987] 2 CLJ 446

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